No. 22,471

ited States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CONNIE JEAN, INC. and FISHERMEN'S UNION LOCAL 33, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,

Respondents.

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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National Labor Relations Board.

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of the Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order,

[1] The pertinent provisions of the Act are reprinted as Appendix A, *infra*, pp. A-1—A-3.

issued against respondents on February 13, 1967, (R. 49-50) [2] and reported at 162 NLRB No. 154. This Court has jurisdiction of the proceeding, the unfair labor practice having occurred in San Diego, California. [3]

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Briefly, the Board found that Connie Jean, Inc. (herein "the employer") violated Section 8(a)(1), (2), and (3) of the Act by recognizing and entering into a contract with respondent Union (herein "Local 33") at a time when another Union was advancing a conflicting claim to representation of the crew of the vessel Connie Jean, and by enforcing and maintaining such contract which contained a union-security clause. In addition, the Board found that Local 33 violated Section 8(b)(1)(A) and (2) by demanding and accepting recognition from, and entering into a contract with the employer while there was a conflicting claim concerning representation, and by enforcing and maintaining the contract containing the union-security clause.

A. Background of the dispute

Eugene Cabral, the master and part owner of the vessel Connie Jean, had previously been part owner and master of a tuna fishing vessel known as the Ecuador. (R. 22; Tr. 23).

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[2] "R" refers to the formal documents reproduced, pursuant to Court Rule 10, as "Volume I, Pleadings"; "Tr." refers to the portions of the stenographic transcript of the unfair labor practice hearing, also reproduced pursuant to Rule 10. References designated "G.C. Ex." or "Resp. Ex." are to exhibits of the General Counsel and respondent respectively.

[3] There is no issue as to the Board's jurisdiction.

In recent years, the crew of the Ecuador had been represented for collective bargaining purposes by the Cannery Workers and Fishermen's Union of San Diego, AFL-CIO (herein "Cannery Workers"), and had been covered by a collective bargaining contract which contained a union-security clause (R. 22; Tr. 43). In October 1965, when the Ecuador had completed a voyage, Cabral terminated the employment of his entire crew because he was selling his interest in the Ecuador and no longer planned to continue as its master. At the time, Cabral was part owner (40 percent) of the corporation (respondent employer) which had the Connie Jean under construction, and it was planned that he would sail as its master when the vessel was completed. (R. 22; Tr. 9).

When the 12 members of the crew of the Ecuador were discharged by Cabral, a number of them asked if they might have employment with him on the Connie Jean when it was ready to sail. Cabral replied that "if they were in [he] would give them preference over someone else." (R. 22; Tr. 41, 42). As it turned out, the Connie Jean was not completed until December 1965, and as of the time of the hearing in April 1966, it had not yet gone out on its maiden voyage, but was still being outfitted (R. 22; Tr. 10, 11).

B. The representation claims and the signing of the contract

On January 18, 1966, [4] Cannery Workers filed a representation petition with the Board, seeking to represent the Connie Jean's crew. The petition named Cabral as the employer and Local 33 as an organization with a representational

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[4] All events described hereinafter occurred during 1966.

interest in the employees, (G.C. Ex. 4). On January 19, the Board by letter, with a copy of the petition enclosed, notified Cabral and Local 33 of the filing of the petition (Tr. 35, 36). On February 4, the Regional Director notified the employer and the two unions that the petition was dismissed because " . . . the question concerning representation sought to be raised by the petition is premature at this time inasmuch as the fishing vessel involved is still under construction and its crew has not been hired . . ." (R. 22; Tr. 36, G.C. Ex. 5). In a letter dated February 9, counsel for Cannery Workers advised Cabral that despute the dismissal of such petition he was being "put on notice that said union has and claims an interest in representing the crew-members of the boat when the crew has been hired. At that time, we shall expect that the interest of the Cannery Workers and Fishermen's Union will be respected . . ." (R. 22; Tr. 38, 39; G.C. Ex. 7).

While the Connie Jean was not then ready to sail, it is the practice in the industry to hire the crew in advance of sailing, in order to work on the nets and perform other tasks preparatory to the voyage. [5] Thus, Cabral made arrangements to hire a crew and requested 10 persons to report on February 15, to work on nets which were to be used on the Connie Jean when it sailed. [6] Of the 10 crew members reporting on that date, 8 had been members of the Ecuador on its final voyage.

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[5] Even though the crew members receive no compensation for this advance work, their compensation being by shares in the catch at the end of the voyage, custom dictates that the employment relationship commence on the date when they first report for voyage preparations. (R. 22; Tr. 27, 28).

[6] The Connie Jean expected to have a crew of 13 when it eventually sailed. Others were hired at a later date (R. 23; Tr. 11, 14, 197).

When the 10 crew members arrived for work on February 15, Cabral addressed them as a group stating that they would "probably be confronted with the unions today," that he "assumed that there would be two unions" and that of the two he would "prefer John Royal's union," *i.e.*, Local 33 (R. 23; Tr. 29, 30, 32). Cabral did not mention Cannery Workers (R. 23; Tr. 30). Later in the morning, Cabral was approached by John Royal, a representative of Local 33, in the area where the crew was working (R. 23; Tr. 30). Royal requested, and was granted permission to talk to the crew members. (R. 23; Tr. 30, 31). On the same day, Royal obtained the signatures of 8 of the crew members to a petition on which they purported to designate Local 33 as their representative for collective bargaining purposes with the employer (R. 23; Tr. 46, Resp. Ex. 1). Seven of the 8 who signed the petition had been members of the Ecuador on its last voyage, and were members in good standing of Cannery Workers. [7]

Royal thereafter, on the same or following day, showed the petition with the signatures to Cabral, and on February 16, between 4 and 5 p.m., Cabral met with representatives of Local 33 and executed a 3-year contract covering the crew of the Connie Jean. The contract contains a union-security clause requiring membership in Local 33 as a condition of employment (R. 23; Tr. 33, 34, G.C. Ex. 3). On February 21, Cannery Workers filed another representation petition (G.C. Ex. 6), identical to its previous petition, covering crew members of the Connie Jean. In accordance with the Board's usual practice, that proceeding is in abeyance pending resolution of the unfair labor practices charged in this case (R. 23).

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[7] See *infra*, p. 10.

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that, by recognizing and entering into a contract with Local 33, while there was a real question concerning representation, and by enforcing and maintaining such contract, which contained a union-security clause, the employer engaged in unfair labor practices within the meaning of Section 8(a)(1), (2), and (3) of the Act. The Board further found that, by demanding and accepting recognition from and entering into a contract with the employer while there was a real question concerning representation and by enforcing and maintaining the contract which contained a union-security clause, Local 33 engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act. Accordingly, the Board ordered the employer to cease and desist from enforcing its contract with Local 33, and to withdraw and withhold recognition from Local 33 unless and until certified by the Board. Local 33 was ordered by the Board to cease and desist from enforcing the contract and from demanding or accepting recognition from the employer. Both respondents were ordered to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND VIOLATIONS OF SECTION 8(a)(1), (2), (3) AND SECTION 8 (b)(1)(A) & (2) OF THE ACT BASED ON THE NEGOTIATION, EXECUTION, AND ENFORCEMENT OF A COLLECTIVE BARGAINING AGREEMENT CONTAINING A UNION-SECURITY CLAUSE, BY LOCAL 33 AND THE EMPLOYER AT A TIME WHEN A RIVAL UNION, BY VIRTUE OF ITS SUBSTANTIAL CLAIM TO RECOGNITION, HAD RAISED A REAL QUESTION CONCERNING REPRESENTATION

When a substantial number of employees in an appropriate unit evidence conflicting desires as to which union, if any,

they wish to join, their employer must maintain strict neutrality, for any action by him which aids or favors one organization over another can greatly influence the employees' decision and effectively deny them the freedom of choice guaranteed by the Act. *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267; *N.L.R.B. v. Waterman Steamship Corp.*, 309 U.S. 206, 226; *N.L.R.B. v. Sunbeam Electric Mfg. Co.*, 133 F.2d 856, 860 (C.A. 7). And since granting exclusive recognition to a union constitutes strong support of the favored union, the Board and the courts have held that the employer must refrain from such action until the resolution of the representation dispute is determined by the Board in an impartial and reliable manner, to-wit, a Board conducted election. *Elastic Stop Nut Co. v. N.L.R.B.*, 142 F.2d 371, 375-376, 379 (C.A. 9), cert. denied, 323 U.S. 722; *Hoover Co. v. N.L.R.B.*, 191 F. 2d 380, 385-386 (C.A. 6); *N.L.R.B. v. National Container Co.*, 211 F. 2d 525, 536 (C.A. 2); *Ohio-Ferro-Alloys Corp. v. N.L.R.B.*, 213 F. 2d 646, 650-651 (C.A. 6); *N.L.R.B. v. Signal Oil and Gas Co.*, 303 F. 2d 785, 788 (C.A. 5). As recently stated by this Court (*Retail Clerks Union, Local 770 v. N.L.R.B.*, 370 F. 2d 205, 207:

> An employer faced with conflicting claims of two or more rival unions which give rise to a real question concerning representation may not recognize or enter into a contract with one of these unions until its right to be recognized has finally been determined under the special procedures provided in the Act.

In order reliably and definitively to settle the vital question of which of two or more competing unions, if any, has been chosen to represent the employees, the Board requires that an employer use the election machinery which Congress created to resolve disagreements of this kind. Thus, under

Section 9(c)(1) of the Act, the Board is directed to conduct a representation election by secret ballot if, upon the filing of a petition by one or more employees, a union, or the employer, investigation and a hearing show that a real question of representation exists. The result of such an election constitutes the best evidence possible of the employees' choice, resolving the representation question and eliminating any obstacle to free collective bargaining, *United Mine Workers v. N.L.R.B.*, 355 U.S. 453, 460; *Ray Brooks v. N.L.R.B.*, 348 U.S. 96, 99-100; *N.L.R.B. v. A. J. Tower*, 329 U.S. 324, 330-332; *N.L.R.B.*, Tenth Annual Report, page 39.

This principle, commonly referred to as the *Midwest Piping* doctrine,[8] as applied by the Board, stands for the proposition that an employer faced with a real question concerning representation interferes with his employees' right of self-organization when, without resorting to Board machinery, he resolves the question by according recognition and executing a contract with one of two rival union claimants; and, as a corollary, that the union thus favored has likewise intruded upon the employees' self-organization rights. *Shea Chemical Corp.*, 121 NLRB 1027; *Novak Logging Co.*, 119 NLRB 1573; *Scherrer and Davisson Logging Co.*, 119 NLRB 1587.

The doctrine, however, has its qualifications. It is not unlawful for an employer voluntarily to recognize a union without resorting to Board machinery if, in fact, such union

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[8] The name derives from *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060. It has been applied consistently by the Board, and has been approved in *N.L.R.B. v. National Container Co., supra*, 211 F.2d at 536 (C.A. 2); *District 50, UMW v. N.L.R.B.*, 234 F.2d 565, 569 (C. A. 4); *N.L.R.B. v. Signal Oil and Gas Co., supra*, 303 F.2d at 787 (C. A. 5); *Ohio-Ferro-Alloys Corp. v. N.L.R.B., supra*, 213 F.2d at 649, 650-651 (C.A. 6); *St. Louis Independent Packing Co. v. N.L.R.B.*, 291 F.2d 700, 704 (C.A. 7); *Iowa Beef Packers, Inc. v. N.L.R.B.*, 331 F. 2d 176, 182 (C.A. 8).

represents a majority in an appropriate unit and no real issue of conflicting rival claims is presented. [9] In determining the existence of a "real issue" concerning representation, the Board has held that the filing of an election petition is not an indispensable prerequisite to the existence of such a question. *Novak Logging Co., supra*, 119 NLRB at 1574; *Sherrer and Davisson Logging Co., supra*, 119 NLRB at 1588, n. 6; *Sunbeam Corp.*, 99 NLRB 546, 550-554. Accord; *Harrison Sheet Steel Co. v. N.L.R.B.*, 194 F.2d 407, 409-410 (C.A. 7). Thus, the Board has applied the doctrine in situations where a substantial claim to representation exists that normally would be resolved by an election. Cf. *Pittsburgh Valve Co.*, 114 NLRB 193, rev'd. on other grounds, 234 F.2d 565 (C.A. 4). In short, such a "question" exists so long as the employer – in the context of a "rival union" campaign – is put on notice that the backing claimed by one union is a bona fide tenable declaration of representation rights and not a mere "naked claim." *N.L.R.B. v. Swift & Co.*, 294 F. 2d 285 (C.A. 3). Accord: *Burke Oldsmobile, Inc.*, 128 NLRB 79, 86, enf'd. 288 F. 2d 14, 16 (C.A. 2); *Gaylord Printing Co., Inc.*, 135 NLRB 510, 511. Similarly, the same principle applies even where, as in this case, a petition for representation has been dismissed without prejudice, but a real question remains as to which rival union represents a majority. *District 50, UMW v. N.L.R.B., supra*, 234 F. 2d at 569-570 (C.A. 4). Accordingly, the principal issue in this case is whether, as the Board found, a real question concerning representation existed at the time the employer extended recognition to Local 33 and entered into a contract with that union.

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[9] The Board regards the existence of a real question concerning representation as a prerequisite to the application of the *Midwest Piping Rule*. See *William Penn Broadcasting Company*, 93 NLRB 1104.

When respondents entered into a collective bargaining agreement on February 16, the record shows that a majority of the crew members hired for the Connie Jean were members in good standing on the books of Cannery Workers, which union for a number of years had represented them while they were employed by Cabral aboard the Ecuador. Though the employees were no longer covered by the contract between Cannery Workers and Cabral with respect to their work on the Ecuador, nor actively being represented by Cannery Workers at the time in question, the membership records show that all 8 of the former Ecuador members were still members in good standing at the time Cannery Workers filed its original representation petition with the Board. They were also members in good standing when Cabral and Local 33 signed the contract, and on February 21, when Cannery Workers filed its second petition with the Board. (R. 25; Tr. 54, 55, 93, 94; G.C. Ex. 8-15, 17). Under standard Board practice such evidence of membership is sufficient to meet the Board's required 30 percent showing of interest by a union, necessary to obtain an election. [10]

Before the Board, respondents argued that the employees' retention of membership in Cannery Workers was insufficient to create a real question concerning representation in the face of the petition evidencing Local 33 as their chosen bargaining representative. Respondents claim that there are other reasons why the employees may have remained members of Cannery Workers, without necessitating a desire for continuing representation. They cite as examples, the protection of death

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[10] See Section 101.18, N.L.R.B., Statement of Procedure, Series 8 (29 C.F.R. Section 101.18). The Board's 30 percent showing of interest requirement can be satisfied by a union through signed authorization cards, a signed designation petition, or as in the instant case, membership records. NLRB Field Manual, July 1, 1967, Section 11022.3.

benefits (Tr. 68-69) and, since it is apparently common for employees to maintain dual membership in unions in this industry, to insure readmission to Cannery Workers without the payment of a reinstatement fee (Tr. 67-68). However, since it is claimed to be common to belong to more than one union, the employees here may have felt it was necessary to designate Local 33 to insure themselves of work — in light of Cabral's expressed preference for that union — and not because they really desired Local 33 representation. This uncertainty adds support to the need for applying the *Midwest Piping* doctrine in order to provide a secret ballot to determine the employees' true choice.

The fact that on February 15, a majority of the crew signed a petition authorizing Local 33 to represent them is unavailing to respondents, since two unions were competing to represent the employees. Dual allegiance is common when more than one union is competing to represent employees, and the Board takes the view that where the only evidence of the choice of employees is found in possibly conflicting designations, e.g., the membership records of Cannery Workers and the designation petition of Local 33, such designations are to be regarded as unreliable, and the choice of an exclusive representative must await an appropriate election. *Midwest Piping and Supply Co., Inc., supra*, 63 NLRB at 1070; *Sunbeam Corp., supra*, 99 NLRB at 551; *Novak Logging Co., supra*, 119 NLRB at 1574-1575. Further, the Board holds that in a competing-union situation, "The numerical percentage of employees represented by one of the contending unions does not foreclose the existence of a real dispute as to representation so as to privilege a premature recognition." *Higgins Industries Inc.*, 150 NLRB 106, 119.

That Cabral was sufficiently put on notice that there was a real question concerning representation between two competing unions is clearly evidenced by the record. Thus, Cannery

Workers took all possible steps to apprise Cabral of its continuing claim to represent the employees in question. Apparently aware of Cabral's intention to give preference to former crew members of the Ecuador, Cannery Workers filed a representation petition, which was dismissed without prejudice as being premature, prior to the time of the actual hiring of the Connie Jean crew. Subsequent to receiving notice of the petition, Cabral also received a letter from Cannery Workers asserting its continuing claim to representation at such time as a crew was to be hired. That Cabral himself recognized the fact that two unions would be competing for the representation rights of the crew was evidenced by the fact that he addressed the crew to that effect, and at the same time expressed a clear preference for Local 33. At no time did he notify Cannery Workers of the hiring of the crew. Though the employees gave no indication to Cabral personally that they no longer desired to be represented by Cannery Workers, Cabral "accepted as determinative the designations on a petition signed after his statement of preference and immediately, without seeking to use Board machinery or even notifying the Cannery Workers, signed a contract" with Local 33 containing a union security-provision (R. 26).

Even if Cabral's statement of preference was not in itself unlawfully coercive, when coupled with the subsequent contract execution, it plainly was "a factor calculated to influence the crew to favor the preferred union" (R. 26). Cf. *Sunbeam Corporation, supra*, 99 NLRB at 550. As the Supreme Court stated in *International Association of Machinists v. N.L.R.B.*, 311 U.S. 72, 78: "[S]light suggestions as to the employer's choice between unions may have a telling effect among men who know the consequences of incurring the employer's strong displeasure." In the instant case, Cabral's statement, coupled with the speed with which the contract was negotiated — within 30 hours from the time Royal secured

the petition from the crew – clearly warranted the Board's finding that the inclusion of the standard union security clause under such circumstances constitutes strong support for the favored union and is further evidence of the violation. "The quick execution of the [union security] agreement at a time when the employer knew of claims by another labor organization that it represented a majority of the employees, is itself evidential of assistance to the contracting union." *N.L.R.B. v. John Engelhorn & Sons*, 134 F.2d 553, 555-556 (C.A. 3). Cf. *N.L.R.B. v. Local 294, International Brotherhood of Teamsters*, 279 F.2d 83, 87-88 (C.A. 2).

In sum, when all of the relevant factors are considered – the past relationship between Cabral, the employees and Cannery Workers; respondents' receipt of the January 18 representation petition; Cabral's subsequent receipt of Cannery Workers February 9 letter asserting its continuing representation claim; Cabral's remarks to the crew on February 15; and the speedy contract negotiation – the weight of the evidence fully supports the Board's conclusion that on February 16 there was an "active and continuing claim" by Cannery Workers, and that despite his full knowledge that there was a real question concerning representation, the "employer elected to make his own choice without regard to whether the designation of [Local 33] represented the true wishes of the crew" (R. 26).

In addition, Local 33 also bore responsibility for " . . . depriving the employees of their right to select their representatives in a free contest between rival organizations." *N.L.R.B. v. Signal Oil and Gas Co., supra*, 303 F.2d at 787. The Board found Local 33's violation to stem from the fact that it "demanded, entered into, and enforced an agreement which was not lawful under the circumstances" (R. 23-24). As the Supreme Court stated in *International Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 738, "It was the

intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employees rights." [11] The Seventh Circuit, in *N.L.R.B. v. Young Metal Products Co.*, 385 F.2d 544, 547, a case involving the premature recognition by a company of a union as exclusive bargaining agent, declared, "We also hold that the Company and the [union] violated Section 8(a)(2), (3) & (1) and Section 8(b)(2) & (1)(A) of the Act by entering into and enforcing a contract containing a union security provision in a contract that was not valid." See also, *Bernhardt Bros. Tugboat Service v. N.L.R.B.*, 328 F.2d 757, 759 (C.A. 7). Further, the Sixth Circuit, in *N.L.R.B. v. Downtown Bakery Corp.*, 330 F.2d 921, 927-928, held that in a rival union context, where no clear showing of majority status had been made by either union, the employer and the respondent union were in violation of the Act by entering into a bargaining agreement.

In the instant case, Local 33 was made aware of Cannery Workers' continuing claim of representation when it received notification by letter from the Board's Regional Office, of the Cannery Workers' January 18 representation petition. (G.C. Exh. 4). The subsequent seeking and obtaining of quick negotiations, inclusion and enforcement of a standard union-security and dues-check-off clause in a contract (G.C. Exh. 3)

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[11] The major issue in the *ILGWU* case was whether execution of a collective bargaining contract with a minority union constituted a violation of 8(a)(2) and 8(b)(1)(A). Since the Court held that this did violate the Act, the Court's rationale is applicable to the present situation where as yet there has been no determination of the representative status, if any, of either of the rival unions, because a question concerning representation still exists.

which was negotiated and signed during the pendency of an unresolved question concerning representation, constituted a violation of 8(b)(2) and (1)(A) of the Act – just as it constituted a violation of Section 8(a)(3) by the employer.

In arguing against application of the *Midwest Piping* rule in this case, respondents pointed to a number of cases where its application has been rejected by the courts. While it is true that courts have on occasion disagreed with the Board's application of *Midwest Piping* in a particular case, [12] it is equally plain that these courts have always endorsed the substance of the general doctrine. [13] See cases cited, *supra*, p. 8, n. 8. Furthermore, in each of the cases relied on by respondents, the court's disagreement with the Board was predicated on a view that the facts did not show the existence of a real question concerning representation, and that the employer could therefore recognize that union whose majority had been conclusively established.

Thus, in several of the cases relied on by respondents, the courts found that clear proof of majority representation

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[12] *N.L.R.B. v. Air Master Corp.*, 339 F.2d 553 (C.A. 3); *N.L.R.B. v. North Electric Co.*, 296 F.2d 137 (C.A. 6); *N.L.R.B. v. Swift & Co.*, 294 F.2d 285 (C.A. 3). *Cleaver-Brook Manufacturing Co. v. N.L.R.B.*, 264 F.2d 637 (C.A. 7), cert. denied 361 U.S. 817. *District 50 UMW v. N.L.R.B.*, 234 F.2d 565 (C.A. 4); *N.L.R.B. v. Indianapolis Newspaper, Inc.*, 210 F.2d 501 (C.A. 7).

[13] In *N.L.R.B. v. Flotill Products, Inc.*, 180 F.2d 441, this Court did not rule directly on the applicability of the doctrine. It declared that though the employer's renewal of a closed shop contract with the union while representation proceedings were pending may have been improper, enforcement of the Board's cease and desist order would not be granted in view of the fact that subsequent to the entry of the order, the representation proceedings had been dismissed by the Board.

was evident from existing facts. For example, that a neutral party checked the union's authorization cards (*N.L.R.B. v. Air Master Corp.*, *supra*, at 555; *District 50, UMW v. N.L.R.B.*, *supra*, at 568); that the employees themselves affirmatively signified their choice in a manner additional to the mere signing of authorization cards (*N.L.R.B. v. Air Master Corp.*, *supra*, at 555, 556; *N.L.R.B. v. Standard Steel Spring Co.*, 180 F. 2d 942, 944 (C.A. 6); or that the employer was "completely impartial in all its dealings with respective parties" (*N.L.R.B. v. Indianapolis Newspapers, Inc.*, *supra*, at 504). However, the case at hand fails to present such factors. Here, after expressing his preference for Local 33, Cabral signed the contract within 30 hours from the time the authorization cards were solicited, with no attempt to verify that Local 33 was the employees' choice, and despite the evidence that Cannery Workers had a strong claim on their allegiance.

The circumstances of this case, therefore, present a situation where application of the principles under discussion is needed. Surely it would not have been an onerous burden for the employer in this instance to have called into play the statutory election machinery. As the Fifth Circuit recognized in *N.L.R.B. v. Signal Oil and Gas Co.*, *supra*, 303 F.2d at 788, n. 3:

> An employer who is faced by rival claims can both protect himself from possible unfair labor practice findings and speedily bring an end to the stalemate in the bargaining process, for Section 9(c)(1) of the Act empowers him to file a petition for an election under such circumstances. Cf. *Brooks v. N.L.R.B.*, 348 U.S. 96, 104; *ILGWU v. N.L.R.B.*, 366 U.S. 731, 739-740. Furthermore, until the Board determines that a question concerning representation does not exist, an employer

> faced with "possible legal jeopardy under *Midwest Piping* doctrine" can refuse to bargain with the union without violating its duty to bargain under Section 8(a)(5). *National Carbon Division*, 105 NLRB 441, 443.

Moreover, Cabral could have obtained a quick answer to the representation question, thereby necessitating minimal interference with the bargaining process, by waiving a formal hearing and agreeing to a consent election. Section 9(c)(4); Section 102.62, NLRB Rules and Regulations; Section 101.19, NLRB Statements of Procedure, Series 8.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a decree should issue, enforcing the Board's order in full.

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March 1968.

CERTIFICATE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;
>
> * * *

(b) It shall be an unfair labor practice for a labor organization or its agents –

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

REPRESENTATIVES AND ELECTIONS

* * *

Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

* * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

APPENDIX B

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Board Cases No. 21-CA-7092, 21-CB-2692

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) through 1(b)	6	6	6
2 withdrawn			
3	33	34	34
4	35	35	36
5	36	36	36
6	37	37	37
7	38	39	39
8	57	79	80
9	80	81	81
10	81	84	84
11	85	86	86
12	87	88	88
13	88	90	90
14	91	91	92
15	60	61	61
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17	93	94	95

RESPONDENT-UNION'S EXHIBIT

1	46	49	49